

AUG 27 1984

LEONARD E. STEVAS,
CLERK

No. 84-209 ②

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL HUFFMAN,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did a substantial variance occur between allegation and proof, when the State's evidence showed that the offense happened during a period of time ("middle of the week") that included, but was not limited to, the dates alleged in the response to notice of alibi (Tuesday or Wednesday of the same week).

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ARTICLE 17 OF THE CONSTITUTION

Section 1. The judicial power shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at any time during their Continuance in Office, be removable by Impeachment.

Section 2. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at any time during their Continuance in Office, be removable by Impeachment.

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**BRIEF IN OPPOSITION TO PETITION
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Respondent, State of Indiana, respectfully requests the Court to deny the issuance of a Writ of Certiorari directed to the Supreme Court of Indiana to review the decision entered by that court in Cause Number 1-683 A 176 on June 5, 1984.

OPINION BELOW

The Court of Appeals of Indiana entered an opinion in this cause on February 8, 1984. The opinion is set forth in Petitioner's Appendix at App. 2. The opinion was not officially reported. A petition for rehearing was timely filed and was denied by the Court of Appeals on February 15, 1984. A petition for transfer was timely filed with the Supreme Court of Indiana, and was denied on June 5, 1984.

A copy of the order denying transfer is set forth in respondent's appendix at App. 7.

STATEMENT OF THE CASE

On November 24, 1982, the Petitioner was charged by information with the offense of child molesting as a Class C felony, on the allegation that the Petitioner had sexual intercourse with a child between the ages of twelve years and sixteen years, on October 19 or 20, 1982 (R.8). On January 10, 1983, the Petitioner filed his notice of alibi stating that he was at his residence during the entire day of October 19, 1982, and was further at his residence during the entire day of October 20, 1982, except for a period from 2:00 p.m. to 3:00 p.m. (R.16). In its response to the Defendant's notice of alibi filed on March 28, 1983, the respondent stated that the offense took place on October 19 or October 20, 1982 (R.35).

At trial, the victim testified that the offense occurred at the Petitioner's home on a day during the middle of the week on which she was taken to the hospital for an examination (R.95-97). The victim's mother testified that the hospital examination occurred on October 23, 1982. October 19 and 20, the dates alleged in both the information and the respondent's response to notice of alibi, fell on Tuesday and Wednesday of that week.

During the testimony of the victim's mother and again at the close of the State's case-in-chief, the petitioner moved to strike the testimony of the victim and the victim's mother because their testimony only showed that the offense occurred during the middle of the week in question, and did not exclude the possibility that the offense occurred on a date other than October 19 or October 20 (R.181, 255).

The record on appeal does not indicate that the respondent requested any continuance to gather evidence for alibi for any other days of the week. Further, the jury instructions are not included in the record presented by the

defendant on appeal, foreclosing appellate review as to whether the jury in following its instructions could have found the defendant guilty on the basis of a factual determination that the offense occurred on a date other than October 19 or October 20, 1982, or whether the defendant tendered instructions directed to that point.

ARGUMENT

THE TESTIMONY OF THE STATE'S WITNESSES AS TO THE DATE OF THE OFFENSE WAS NOT IN SUBSTANTIAL VARIANCE WITH THE ALLEGATIONS OF THE RESPONSE TO NOTICE OF ALIBI

Substantial variance between proof and allegation may be grounds for reversal on due process grounds, if the defendant is as a result is not definitely informed of the charges against him, or is deprived of protection against another prosecution for the same offense. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314; *Bennett v. United States*, 227 U.S. 333, 33 S.Ct. 288, 57 L.Ed. 531 (1913).

In the present case, the State's evidence placed the offense in the middle of the week of October 23, 1982 (R.95-97). The dates for the offense alleged in the response to notice of alibi were October 19 and October 20, 1982, or Tuesday and Wednesday of that week. The record shows no attempt by the defendant either to move for a continuance to discover alibi for any other days in the middle of the week, or to tender jury instructions that the jury must find that the offense took place on the dates alleged.

Particularly in the absence of a showing that the defendant moved for a continuance or tendered any instruction as suggested above, respondent urges that the petitioner was not deprived of due process in this matter. After all, it can scarcely be denied that Tuesday or Wednesday are in the middle of the week. Tuesday or

Wednesday were alleged as the date of the offense, and the middle of the week was proved. There thus was no variance at all. At most, the respondent's proof was not different from, but only more expansive than, the allegation.

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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